



The State of New Hampshire  
**DEPARTMENT OF ENVIRONMENTAL SERVICES**



**Robert R. Scott, Commissioner**

**FP 2020-54, Env-Dw 1100 - Drinking Water State Revolving Loan Fund Program  
Summary of Comments on Initial Proposal with DES Responses  
September 10, 2020**

**Introduction**

The existing rules, Env-Dw 1100, implement RSA 486:14, which authorizes the Department to participate in federally-funded drinking water revolving loan funds or grants under the federal Safe Drinking Water Act. The rules are proposed to be readopted with amendment in response to an audit of the program that identified several deficiencies, including needing to clarify how interest rates are selected during the supplemental loan agreement process. In addition, revisions are proposed to (1) better align the Drinking Water State Revolving Loan Fund (DWSRF) rules with the Clean Water State Revolving Loan Fund (CWSRF) rules and the Drinking Water and Groundwater Trust Fund (DWGTF) rules and (2) update the rules, including but not limited to the changes noted in the Rulemaking Notice published in the June 11, 2020 *Rulemaking Register*.

The Department conducted a public hearing on these rules via WebEx on July 16, 2020. One person attended the hearing, but indicated that she had no comments. The Department did not hear from anyone during the hearing or subsequent to the hearing about any technical difficulties with access to the WebEx forum. The Department received one written comment from the public. This comment and the Department's response thereto is summarized below. Written comments were received from the Office of Legislative Services, Administrative Rules (OLS); those comments and the Department's responses thereto are summarized below.

**Env-Dw 1100 generally**

*Comment:* *I would like more Water System Operator interface during the design and construction of the projects. I am finding that most of the operators refuse to participate because they are not getting paid. There should be a monetary allowance or some method for them to be involved since they will be inheriting the system after construction.*

*Response:* Regarding Operator involvement, recipients already have the ability to hire operators as part of the 'engineering' or for Construction Admin/Clerk of the Works. The Department agrees that operator input is critical for the long term success of the project. The contract can be directly with the Operator or as a sub to the engineer. Department staff are available to assist with this.

**From OLS:**

*Comment:* *OLS provided a "Note to JLCAR on Legis. Intent:" relative to the rulemaking public hearing being held as a remote public hearing accessed by WebEx due to the pandemic, asserting that "RSA 541-A:11 appears to presume in-person hearings ..."*

*Response:* The Department believes that nothing in RSA 541-A mandates that a hearing be held in person without the use of technology. Just because the statute does not explicitly allow such hearings does not automatically mean they are disallowed. RSA 541-A was enacted when electronic filings were not even contemplated, yet we have been allowed to file electronically since prior to the statute being amended to explicitly recognize it. Indeed, allowing hearings to be held remotely -- with or without a corresponding "in person" component -- is likely to increase public participation as it will be more convenient for persons who do not live in the area where the hearing is conducted. As noted above, the Department experienced no technical difficulties with the technology used and ensured that each participant had the opportunity to comment. The Department believes that the spirit and intent of RSA 541-A relative to public participation in rulemaking proceedings has been met.

**Env-Dw 1102.06 re: definition of “asset management program”**

Comment: “**Unclear:** Is the sustainable level of service standard established pursuant to 40 CFR Part 35? With the removal of the “acceptable” language, it is unclear who or what determines sustainability. If it is DES, there should be criteria for this determination in a substantive rule elsewhere in Env-Dw 1103 et seq. or in a federal regulation.” (Bold in original.)

Response: The Department has revised the definition to retain only the essential components of an asset management program.

**Env-Dw 1102.52 re: definition of “resident project representative”**

Comments: “**Unclear.** Who or what is making this determination? Is there an applicable statute or administrative rule to cite? Consider rewriting: ‘when the project’s plan and scope of work indicate supervision by an engineer is required.’” (Bold in original.)

Response: The Department has revised the definition as suggested.

**Env-Dw 1102.53 re: definition of “responsible bidder”**

Comments: “**Unclear.** Does the bidder have to submit something to prove this Or is this a subjective determination by the other party? By the Department?” (Bold in original.)

Response: The bidder does not have to submit anything. Whether the bidder has a good reputation is generally known in the industry, so the Department and the recipient can be guided by that. For example, the recipient and the Department typically will know which bidders try to cut corners and/or inflate reimbursement requests.

**Env-Dw 1104.03 re: pre-application procedures**

Comment: [(b)(3)a. is] “**Unclear.** At least the web address for this electronic submission must be provided in the rule.” (Bold in original.)

Response: The pre-application solicitation that the Department sends out contains all of the information a potential applicant would need to submit a pre-application. Due to continuously-evolving technology, the web address has changed several times in the past few years and is likely to change again.

**Env-Dw 1104.04 re: pre-application information**

Comment 1: [(a)(8) is] “**Unclear.** Is the applicant bound to submit this information in a particular format when it attaches/links it to the Department’s pre-applicant [sic] announcement? Is the Department supplying this document that the applicant must use?” (Bold in original.)

Comment 2: “**Unclear.** If the applicant can submit this information in whatever format it chooses, then edit the sentence to say: ‘If the applicant submits the information on paper, the name, title, ...’” (Bold in original.)

Response: The Department provides electronically all information a potential applicant would need to submit a pre-application. In the rare case where an applicant cannot compile the application information electronically, either the applicant or the Department can print off a paper format for the applicant to use. Since the provided document does not, in and of itself, require the submittal of any information (all information is required to be submitted by the rules), it is not a form as defined in RSA 541-A. Nonetheless, the Department is providing a copy with this final proposal.

**Env-Dw 1104.05 re: pre-application signatures and certifications**

Comment: “**Unclear.** Env-Dw 1104.04 describes the applicant as submitting the information either electronically or as paper along with the Department’s pre-application announcement, Here the language seems to be saying that the applicant is completing an electronic-based questionnaire that the Department is supplying rather than simply submitting information along with a pre-application announcement. The Department needs to provide screen shots of each page the applicant must complete, as the questionnaire seems to be a form.” (Bold in original.)

Response: RSA 541-A:1, VII-a defines “form” as “a document that *establishes a requirement* for persons outside the agency to provide information to an agency and the format in which such information must be submitted. The term *does not include* any document, *regardless of what the document is called*, that (a) is *provided by an agency to facilitate the submission of information that is required to be submitted to the agency by* federal or *state* statute, regulation, or *rule and does not add to or modify such requirement...*” [Emphasis added.] The Department provides electronically all information a potential applicant would need to submit a pre-application. In the rare case where an applicant cannot compile the application information electronically, either the applicant or the Department can print off a paper format for the applicant to use. Since the provided document does not, in and of itself, require the submittal of any information (all information is required to be submitted by the rules) and does not modify the information to be submitted, it is not a form as defined in RSA 541-A. Nonetheless, the Department is providing a copy with this final proposal.

#### **Env-Dw 1105.01 re: prioritization of proposed projects**

Comment: [(a)(1) is] “**Unclear.** Which Act is meant? Is 40 CFR § 35.3520 meant?” (Bold in original.)

Response: The Department has clarified that the federal Safe Drinking Water Act is meant.

#### **Env-Dw 1106.01 re: final application requirements**

Comment: “**Unclear/Legis. Intent.** Where does the applicant obtain the applicable document to submit the information to the Department? Is it permissible for an applicant to submit the information on whatever type of material it wants and in whatever format it chooses? Or are there document types supplied by the Department that the applicant must use for the submission of the required information in Env-Dw 1106.03 through Env-Dw 1106.09? If so, then these are forms that must be submitted to OLS for JLCAR review pursuant to RSA 541-A:19-b regardless of what the agency may name or call them.” (Bold in original.)

Response: RSA 541-A:1, VII-a defines “form” as “a document that *establishes a requirement* for persons outside the agency to provide information to an agency and the format in which such information must be submitted. The term *does not include* any document, *regardless of what the document is called*, that (a) is *provided by an agency to facilitate the submission of information that is required to be submitted to the agency by* federal or *state* statute, regulation, or *rule and does not add to or modify such requirement...*” [Emphasis added.] RSA 541-A:19-b allows an agency to “adopt a form as defined in RSA 541-A:1, VII-a by incorporating the actual form by reference *or* by setting forth the requirements of the form in rules adopted according to the procedures in this chapter.” (Emphasis added.) The Department provides electronically all information a potential applicant would need to submit a final application. In the rare case where an applicant cannot compile the application information electronically, either the applicant or the Department can print off a paper format for the applicant to use. Since the provided document does not, in and of itself, require the submittal of any information (all information is required to be submitted by the rules), and since it does not modify any of the required information, it is not a form as defined in RSA 541-A. Nonetheless, the Department is providing a copy with this final proposal.

#### **Env-Dw 1106.04 re: applicant’s authority to borrow**

Comment: [(e) is] “**Unclear.** What are the templates? Where do applicants find them? Must applicants use them, or will an applicant created template suffice? If the applicant must complete/use the Department’s templates then these are forms subject to RSA 541-A.” (Bold in original.)

Response: A template is a “pattern, guide, or model” that can be used to assist in the creation of a final document. The templates are provided by the Department upon request and contain sample language that can be used by applicants to meet the requirements of the rules. Applicants are not required to use the Department’s templates (hence the use of the verb “may”), and are allowed to develop their own language to meet the confirmation requirements.

**Env-Dw 1106.06 re: capacity assurance self-assessment**

Comment: [(f) is] “**Unclear.** Is template meant? See Env-Dw 1106.04(e) above. Is the applicant required to use the Department’s document or may the applicant use whatever it chooses? If the applicant must use the Department’s document, then it is a form despite what the Department may call or name it, and it is subject to RSA 541-A requirements.” (Bold in original.)

Response: No, template is not meant. Further, it should be clear from the verb used, i.e., “applicant **may** use”, that using the Department’s document is optional. However, because forms previously were incorporated by reference, the Department still has documents that can be used to facilitate the submission of the required information. While it is easier for applicants to use the Department’s document and so many do, it is not required.

**Env-Dw 1106.09 re: establishment and verification of revenue program**

Comment: [(d) and (e) are] “**Unclear.** May an applicant submit this information in both paper and electronic format? Is email sufficient?” (Bold in original.)

Response: Env-Dw 1106.01(g) requires verification of a revenue program to be submitted as part of the final application, and so would be submitted electronically if the final application is submitted electronically and would be submitted on paper if that’s how the final application is filed.

**Env-Dw 1106.10 re: signatures and certifications for final applications**

Comment: “**Unclear/Legis. Intent.** See note on page 14, and other previous notes. The Department inconsistently states that applicants are submitting only information, in some places requires the applicants use ‘templates’, and then also calls this submission a form. The Department appears to use different terms and phrasing in an attempt to call a form something else so that it is not subject to RSA 541-A review.” (Bold in original.)

Response: See previous responses, in particular regarding how “form” is actually defined in RSA 541-A and the use of the templates being optional. The Department has deleted the word “form” from this rule to try to minimize any confusion.

**Env-Dw 1106.11 re: final application processing**

Comment: [(b) is] “**Unclear and Legis. Intent.** RSA 541-A:29 requires agencies to notify applicants of incomplete applications.” (Bold in original.)

Response: The Department always notifies applicants if an application is incomplete. However, the Department has re-inserted the language.

**Env-Dw 1107.15 re: accounting**

Comment: [(d)(1) is] “**Unclear.** This document has not been properly incorporated by reference, unless it is already required by federal law.” (Bold in original.)

Response: OMB Circular A-133 is not being incorporated by reference, as the Department will not be “enforcing” any of its provisions. It is cited simply to identify where the threshold amount for having to have an annual audit done can be found.

**Env-Dw 1108.04 re: draft environmental assessment**

Comment: [(b)(4)b. is] “**Unclear.** The requirements of the federal statute would need to be met not just its objectives.” (Bold in original.)

Response: Clause (b)(4)a. requires compliance with the federal and state statutes; (b)(4)b. is intended to capture the federal regulations that implement the statute. The rule has been clarified.

**Env-Dw 1108.05 re: public notification and review period**

Comment: [(a)(2)b.-c. are] “**Unclear.** If the applicant is in the impacted municipality, then notice does not need to be provided to the impacted municipality? Is the Department sending notice? Or is publishing the notice sufficient pursuant to applicable law?” (**Bold** in original.)

Response: This section requires the applicant to prepare and send the notice. Clause (a)(2)b. requires the applicant to send an electronic copy of the notice and draft EA to the local governing body of the municipality unless the applicant **is** the municipality, not merely in the municipality. If the applicant is the municipality, the local governing body necessarily already knows what is going on. The Department has revised the language to be clearer. The Department also has modified clause (a)(2)c. so that the conservation commission has to be notified even if the municipality is the applicant, based on information received that communications to conservation commissions need to be affirmatively required.

**Edits:** Env-Dw 1102.10; 1102.21; 1102.44; 1102.48; 1102.52(b); 1102.53(b); 1102.58-.59; 1104.05(c); 1105.04(b)(4); 1106.02(a); 1106.03(m); 1106.04; 1106.05(c); 1106.06(b), (c)(2); 1107.01(a); 1107.04(b); 1107.09(a)(2); 1107.10(a)(2)b.; 1108.05(c); 1110.06(c)